Supreme Court, U.S.
FILED
DEC 18 2014
OFFICE OF THE CLERK

No. 14-571

# In the Supreme Court of the United States

APRIL DEBOER, ET AL., PETITIONERS

*v.*

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL., RESPONDENTS

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF NEITHER PARTY

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## *AMICUS CURIAE* STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Neither Party in Case 14-571 ("*DeBoer*").[2] He and a client were amici in the Sixth Circuit iteration of *DeBoer*, and Amicus writes now to recommend caution before prematurely granting certiorari.

New developments keep arriving re the same-sex ("gay") marriage debate: for example, a former President who supports gay marriage and can hardly be called a "homophobe", nevertheless supports a democratic decision on the issue: "Jimmy Carter . . . . told the local ABC affiliate[,] '[I]f Texas doesn't want to have gay marriages then I think it's a right for Texas people to decide[.] People who happen to be gay...I think they ought to have equal rights to marry.'"[3] Carter's wise and moderate balance, *see id.*, of having his own views but not being willing to inflict them on the People if they disagree, is a valuable guiding star. Other guiding stars may arrive from various Circuits' decisions, too, if this Court is willing to wait prudently.

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[1] No party or its counsel wrote or helped write this brief, or gave money to its writing or submission, *see* S. Ct. R. 37. Blanket permission to write briefs is filed with the Court. Parties were contacted 10 days before this brief's due date.

[2] *April DeBoer, et al., v. Rick Snyder, Governor of Michigan, et al.*, -- F.3d --, 2014 U.S. App. LEXIS 22191 (6th Cir. Nov. 6, 2014, No. 14-1341), *pet. for cert. pending* (U.S. Nov. 18, 2014).

[3] Lauren McGaughy, *Jimmy Carter: States should decide on gay marriage*, Houston Chron., Oct. 27, 2014, http://blog.chron.com/texaspolitics/2014/10/jimmy-carter-states-should-decide-on-gay-marriage/.

## SUMMARY OF ARGUMENT

The Court should consider granting certiorari in *DeBoer*, *supra*, but not until after multiple relistings. Various important arguments still have not been addressed thoroughly by courts.

*DeBoer* has many strong points, although *United States v. Windsor*, 133 S. Ct. 2675 (2013), has far fewer. *Windsor*'s possible mistakes should be avoided when the Court decides about each State's People's right to decide on gay marriage.

However, *DeBoer*'s weak points echo some of *Windsor*'s, including the illusion that homosexual parents are essentially indistinguishable from heterosexual ones. Also, *DeBoer* fails to deal, either fully or at all, with crucial issues such as: bisexuals' channelability towards traditional marriage; the compelling interest of gender diversity, *à la Grutter v. Bollinger* (539 U.S. 306 (2003)), that supports diverse-gender marriage; sodomy's infertility and disease-vector problems, and sodomy-norming by State-endorsed gay marriage; children's suffering from being denied a mother or a father, in a State-blessed monogender marriage; the invalidity of sexual-orientation or sex-discrimination claims; and gay-marriage supporters who oppose mandatory gay marriage.

Thus, more percolation is crucial.

## ARGUMENT

### I. *DEBOER* WAS CORRECTLY DECIDED BUT OFFERS TOO LITTLE GUIDANCE ON RELEVANT ISSUES

Amicus was pleased to see *DeBoer* decided in the Sixth Circuit so as to uphold the People's will. Michigan may not have made better arguments than other States in other Circuits made, but was fortunate enough to have a jurist, Judge Jeffrey Sutton, who (with Judge Deborah Cook) understood that even in those limited arguments, there was enough good to sustain the same-sex-marriage bans.

What Sutton did not do, unfortunately, was to go beyond a bare-bones "rational basis" defense of the bans, with incentivizing of two people who can naturally make children to stay together, especially re unplanned pregnancy (a specialty of heterosexuals), and a prudent wait-and-see attitude about gay marriage, as reasons for letting things be, *see* 2014 U.S. App. LEXIS 22191 at *38-42. He did not really address the possibility that a court may cede a rational basis for the bans, but find that intermediate or strict scrutiny applies, so that the bans thereby fall.

This is one reason why this Court should wait for further percolation of the issues. Even if various courts have read arguments for why gay-marriage bans meet strong scrutiny, courts have not always responded to them in a detailed or accurate fashion.

## II. WHY RELISTING *DEBOER* WOULD BE BETTER THAN REJECTING IT

But *DeBoer* should be relisted, not denied certiorari entirely. —Amicus is grateful that the Court, back on October 6, did not immediately grant certiorari to various gay-marriage cases. He had recommended caution, *see* Br. of *Amicus Curiae* David Boyle in Supp. of Neither Party, in *Herbert v.*

*Kitchen*, 14-124, *passim*. However, one thing Amicus did not recommend was to simply reject the cases, instead of relisting them. Relisting would have added to the Court's options about eventual certiorari. The bigger the jurisprudential smorgasbord, the better, so to speak.

However, the Court rejected all the cases, which led to much crowing in the mass media to the effect that the Court thus essentially legalized gay marriage throughout America. Indeed, many same-sex couples (either gay or seeking social or financial benefits from same-sex marriage) have since married in the Circuits affected, which could cause chaos if this Court, as it should, upholds the same-sex-marriage bans in those Circuits, bans which could invalidate the marriages.

(Incidentally, Amicus does not know why the various States seeking certiorari before October 6, did not show the tactical *savoir-faire* to petition for rehearing. Had they done so, by Halloween—of all dates—, then their petitions would have been reconsidered after the *DeBoer* decision created a circuit split. We may never know, this side of glory, what would have happened.)

The chaos mentioned *supra* might be lessened, arguably, if those same-sex couples who marry before the Court's final decision are allowed to remain married, but no more same-sex marriages are allowed to take place afterwards. Amicus is not supporting same-sex marriage here; but if allowing already-contracted marriages to remain valid is the equitable price to pay for disallowing any future marriages, so be it. Those few same-sex couples who were allowed to marry, could serve as a sort of

"experimental body", whose marriages, and children (if any), can be observed for whatever good or bad effect occurs over time, by the People, who will eventually vote about the future of same-sex marriage.

The chaos might also be lessened by relisting more cases, instead of denying grants entirely. This would avoid further confusion, and also keep *DeBoer*, a worthy case, "on board" for possible certiorari, by itself or along with other cases.

## III. ONE KEY INSIGHT IN THE *DEBOER* OPINION: COMPARING GAY MARRIAGE TO SMALL-GROUP POLYGAMY

One of the strongest points in *DeBoer* is that Sutton rightly notes, *see id.* at *44-45, *59-60, that small-group polygamy is a rough equivalent of gay marriage. (Indeed, if any supposed "biological predisposition to homosexuality" legitimates gay marriage, then why does not what many believe is most males' "biological predisposition to promiscuity" legitimate polygamy?)

One reason that two-person diverse-gender marriage is so wonderful, is that it is a compromise between the extremes of "genderless" marriage, i.e., two-person same-sex marriage, and more-than-two-person diverse-sex marriage, i.e., polygamy.[4] Gay marriage is hobbled by being sterile, employing sodomy (statistically, a strong vector of disease and

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[4] Re *gay polygamy*, gay-marriage advocates only talk about "marriage equality", instead of really supporting it, since they are not fighting for the rights of those who want same-sex polygamous relationships.

injury), and depriving children, if any, of a father or mother. Polygamy offers a mother and father, and plenty of fertility; but it is hobbled by being "too much of a good thing", since having fifty mommies or daddies might be worse than having just one.

However, that does not *ipso facto* mean that all polygamy is bad, since there may be fewer than fifty-one partners in a relationship. Similarly, a State might claim to find gay marriage meritorious, since a State might choose *not to value* gender diversity in marriages. (Just as a State need not find diversity a compelling state interest in education, *see Grutter, supra* at 2, and *cf. Schuette v. BAMN*, 134 S. Ct. 1623 (2014).)

While Amicus personally finds plural marriage (polygamy) to be disgusting and vile, that is his personal preference, which should not affect any right of polygamists to receive marriage licenses. And once traditional marriage is thrown to the wolves by saying that the "fundamental right to marry" covers basically any consenting adult, and by claiming that "denial of benefits to the kids" or "government stigmatization of the marriage" is enough reason to prevent bans on non-traditional marriage, there is, as Sutton implied, not a lot of reason to make gays the special favorites of the law, and to give them special marriage privileges that small-group polygamists do not have.

After all, polygamy, including small-group polygamy, has *vastly* more supporting tradition in world history than gay marriage. (Judge Martha Craig Daughtrey's *DeBoer* dissent, saying "Even today, polygynous marriages outnumber monogamous ones", *id.* at *114, hurts her cause

more than helps it. If polygamy has a deeper tradition than gay marriage, then perhaps it should be legalized *first* in this country, long before gay marriage.)

Even the Twelve Tribes of Israel are the fruit of polygamy. *See, e.g.*, *Genesis* 46:8-25, noting Jacob ("Israel") sired Reuben, Simeon, Levi, Judah, Issachar, and Zebulon through Leah; and Asher and Gad through Zilpah, Leah's handmaid; and Joseph and Benjamin through Rachel; and Dan and Naphtali through Bilhah, Rachel's handmaid. *Id.*

World Jewry turned out just fine despite that multi-mothered background, *id.*—it would risk sounding anti-Semitic to say otherwise.

Since not only could a man espouse multiple wives, but a woman could espouse multiple husbands, too, polygamy need not lead to a "wife shortage". Or the State could require that all plural marriages be sex-equal, e.g., two men and two women. Just as the State chooses a sensible number of years before youngsters can marry (sixteen may be old enough; six is not), without any obvious dividing line (why sixteen instead of seventeen or eighteen?), it can plausibly choose a maximum size for marriages, e.g., four people, which is smaller than the *ménage à cinq* of Jacob and his intimate partners, *supra*. Or if the maximum number in a marriage can be two, then maybe the minimum number of genders in a marriage can be two also. *Voilà* traditional marriage.

There will be more later on the animus that gay-marriage advocates have arguably shown towards

polygamists; but first, we shall address *Windsor*, as an introduction to some flaws in Sutton's analysis.

## IV. *WINDSOR*'S LOGICAL PROBLEMS HAVE LEFT A TRAIL OF SERIOUS CONFUSION

Some State attorneys might be tempted to flatter the Court majority, by saying *Windsor* was rightly decided but still allows State gay-marriage bans. However, other viewpoints may exist.

For one, *Windsor*'s consequences, if we take the opinion seriously, may be absurd. E.g., if federal law must recognize *any* marriage allowed by a State, then what if a "progressive" State allows consensual adult incest, say, to people over 21 years old who possess signed statements from two separate counselors or psychiatrists, that there are no issues of coercion, mental illness, etc., preventing fully informed consent? The federal government would have to recognize and subsidize that. The Court may find incest repulsive—who doesn't?—, but the issue is not repulsiveness, it is constitutionality.

Naturally, this also applies to polygamy. If the imaginary State of Tuah legalizes small-group polygamy, then *Windsor* shackles the federal government into giving benefits and recognition. ...and the same if Tuah legalized *large*-group polygamy. It opens Pandora's box to subordinate the federal government to state governments in these marriage matters. This alone makes *Windsor*'s logic questionable.

Among *Windsor*'s other problems, there is the statement that, besides "humiliat[ing] tens of thousands of children now being raised by same-sex

couples", "[t]he law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id.* at 2694 (Kennedy, J.). But in real life, that imagined "closeness", *id.*, does not always exist. There are plenty of children who are not happy to be deprived of either a mother or a father, or to have two parents in a sterile (infertile) sexual relationship which may also incidentally violate any ethical beliefs of the children, given that many children may have traditional ethical beliefs.

Amicus does not just theorize this, but has four clients, Katy Faust, B.N. Klein, Robert Oscar Lopez, and Dawn Stefanowicz, in *DeLeon v. Perry*, the Fifth Circuit (Texas) gay-marriage case,[5] clients whose four separate amicus briefs testify that each amicus was raised by same-sex parents and was hurt and damaged by this experience.

By contrast, Amicus knows of no one who claims that children can be damaged by *having* a mother and a father. (Just as therapy exists to change from homosexual to heterosexual, but not the other way around.) Thus, there is a basis, whether "rational" or "compelling", for States to ban monosex marriages.

However, it is not enough for Amicus merely to mention this issue to the Court, the issue of children damaged by same-sex parenting; it would be better to wait and see the Fifth Circuit deliver its opinion, which may well comment on the claims raised by Amicus' four amici clients. (Amicus is asking no

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[5] No. 14-50196, *oral arg, pending* Jan. 9, 2015 (975 F. Supp. 2d 632 (W.D. Tex. 2014)).

personal favor for himself or his clients; but he coincidentally happens to be representing some people who have important stories to tell.)

As for "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage", *Windsor* at 2693, homosexual marriage itself is extremely "unusual", in terms of non-traditionalism, total sterility, total reliance on sodomy, and total exclusion of either a mother or a father for a child. Given that "unusualness", it was not out of place for federal law to treat same-sex marriage in an atypical manner.

Also, why could the Executive Branch not have been allowed to issue a disclaimer whenever federal law was implemented to interpret marriage as solely opposite-sex, "This designation is neither an acknowledgment nor a declaration by the Congress or President of the United States that same-sex marriages are inferior to other ones"? A similar solution was recently broached re putting "Israel" instead of "Jerusalem" on the passport of people born in Jerusalem; so if that sort of solution were really viable for the passport (which is unlikely, since it sends a rather schizophrenic message), it should have worked in *Windsor* as well.

Amicus appreciates the compassion shown by the *Windsor* majority towards the putative plight of children with gay parents. However, since the Court majority did not show equal compassion to the plight of children with polygamous parents, there is "cognitive dissonance" here.

Speaking of "cognitive dissonance: like many observers, Amicus cannot fully tell what is going on in *Windsor*. Is it about federalism? Or individual rights? And were the mid-1990's Congress and President really so totally bigoted? *Windsor* lacks the intellectual crispness of a *Lawrence* (*v. Texas*, 539 U.S. 558 (2003)), which nicely demarcated things, *see id.*, by protecting the negative liberty of freedom-from-arrest for homosexuals, while not promising any state entitlements ("positive liberties") for them. *Windsor* is almost more like a Rorschach blot.

No one is calling the *Windsor* majority "sons of anarchy" (or "daughters of anarchy"); but attempted rationales, like *Windsor*'s, which openly mystify and confuse many people, are best avoided.

We return to Sutton's opinion, and some gaps or errors there:

## V. WEAK POINTS IN THE *DEBOER* OPINION, NEEDING FURTHER PERCOLATION ELSEWHERE

Sutton echoes *Windsor*'s lionization of gay parenting: "And gay couples, no less than straight couples, are capable of raising children and providing stable families for them. The quality of such relationships, and the capacity to raise children within them, turns not on sexual orientation but on individual choices and individual commitment." *DeBoer* at *39. His words are well-meant but conclusory. With relatively few years of gay-marriage experience in America, how can Sutton categorically conclude as he does?

The testimony of Amicus' four clients alone, *supra* at 9, refutes Sutton's imaginings that gay parenting is undistinguishable from dual-gender parenting. And Sutton also avoids or misconstrues other issues:

### A. Gay-Marriage Bans Channel Bisexual or "Sexually Fluid" Persons to Choose Opposite-Sex Spouses Instead of Same-Sex Spouses

While Sutton mentions, accurately, that marriage benefits only for heterosexual couples are fitting because such couples may have unplanned pregnancies and should receive incentives to stay together for their children, Sutton does not really answer the assertion, "But since gay couples are not going to enter heterosexual marriages anyway, and 'vice versa': a gay-marriage ban just hurts homosexual couples, instead of helping heterosexual couples."

However, being either gay or straight is a false dichotomy. *See, e.g.*, the Wikipedia article *Bisexuality*,[6] listing figures ranging from 0.7 to 5 percent of Americans being bisexuals, *see id.* There may be even more bisexuals than homosexuals: "*The Janus Report on Sexual Behavior*, published in 1993, showed that 5 percent of men and 3 percent of women considered themselves bisexual and 4 percent of men and 2 percent of women considered themselves homosexual." *Id.* (footnote omitted); "Alfred Kinsey's 1948 work *Sexual Behavior in the Human Male* found that '46% of the male population had engaged in both heterosexual and homosexual

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[6] http://en.wikipedia.org/wiki/Bisexuality (as of Nov. 3, 2014, at 15:36 GMT).

activities . . . . in the course of their adult lives'." *Id.* (footnote omitted)

(Even those already in gay relationships may change course towards non-gay ones. For example, Ellen DeGeneres' lesbian lover Anne Heche later married a man, Coleman Laffoon, and then moved on to James Tupper, having a son by each, *see, e.g.*, Wikipedia, *Anne Heche*.[7])

So, if there are c. 315 million Americans right now, each 1% of the population that is bisexual equals c. 3 million bisexual Americans. Normally, given average odds, half of those bisexuals might choose a same-sex long-term relationship, and half an opposite-sex long-term relationship. But if same-sex marriage were unavailable, then of those bisexuals who might otherwise have chosen a same-sex relationship, any who want to marry would need to choose opposite-sex partners, the only marriage partners available. Potentially millions of sexually-fluid people moved into diverse-gender marriage provides more than a mere "rational basis" for laws permitting only heterosexual marriage, but rather, quite a compelling state interest.

Even some proponents of gay marriage admit, and lament, that gay-marriage bans "channel" bisexuals into heterosexual marriages. *See* Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 San Diego L. Rev. 415 (2012) ("Boucai"), "This Article proposes that same-sex marriage bans channel individuals, particularly

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[7] http://en.wikipedia.org/wiki/Anne_Heche (as of Nov. 16, 2014, at 03:37 GMT).

bisexuals, into heterosexual relations and relationships[.]" *Id.* at 416; and: "With regard to procreation, this Article's argument implicitly concedes one way in which same-sex marriage bans advance the state's interest: by increasing the number of bisexuals who pursue same-sex relationships, legalization presumably will decrease these individuals' chances of reproducing." *Id.* at 482.

Why does neither Sutton, nor any other judge Amicus can think of, bring up the bisexuality issue? Indeed, as Boucai notes: "Bisexuality is 'virtually invisible' in same-sex marriage litigation." *Id.* at 452. Whatever the reason for omission, the absence of a discussion of bisexuality's effects is a gross material omission in any gay-marriage case. Thus, the Court should wait until one or more of the Circuits discusses the issue thoroughly.

### B. *Grutter* and Children's Benefit from Diverse-Gender Parentage

There is another socially positive aspect to gay-marriage bans besides increased fertility: i.e., promoting diverse-gender parentage for children. This chimes with *Grutter*, which upholds diversity, including gender diversity, as a compelling state interest, *see* 539 U.S. at 325. (The Sixth Circuit iteration of *Grutter*, 288 F.3d 732 (2002), cites with favor the use of gender as an allowable consideration in giving preferred treatment, *see id.* at 745.) Although *Parents Involved in Community Schools v. Seattle*, 127 U.S. 2738 (2007), declined to apply a *Grutter*-esque diversity rationale outside of higher education, *see id.* at 2754, that does not mean one

cannot sensibly argue for that interest in a family setting. (Ironically, Michigan's Republican-leaning state attorneys, who tend to dislike affirmative action, may thus be loath to employ *Grutter*, even if it is one of the best weapons they have. Perhaps they should lose their loath-ness.)

In fact, parents, whether home-schoolers or not, have long been considered über-educators of a sort. *See, e.g., Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925), noting "the liberty of parents and guardians to direct the upbringing and education of children under their control", *id.* at 534-35 (McReynolds, J.). Thus, it is not a great leap to apply the *Grutter* "educational" diversity rationale to parentage and marriage as well.

Indeed, since it would be ludicrous to say diversity is *compelling* over a few years of university education but cannot even be *rationally* relevant in 18 years of child-nurture, then a gender-diverse parentage is worthy of special favor by the State. (*See, e.g.*, HHS, *Promoting Responsible Fatherhood—Promoting Responsible Fatherhood Home Page* (last revised July 21, 2011),[8] "Involved fathers provide practical support in raising children *and serve as models for their development*." *Id.* (emphasis added))

Some may make questionable counterarguments, e.g., "Then why couldn't a State make forced interracial marriage a compelling state interest?" But that would be unadministrable; there are so many racial or interracial categories, that it would be impossible to assign people. By contrast, there are only two sexes; and the arrangement is quite

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[8] http://www.fatherhood.hhs.gov/.

workable, having been *the* standard arrangement worldwide for thousands of years.

Some critics have said that gay-marriage bans presume same-sex couples can never be good parents. However, the "presumption" may only be that diverse-sex couples have something special to offer in parenting. On that note: the two *Grutter* cases *supra* show how gender diversity matters; and part of the rationale States may adopt per *Grutter*, 539 U.S. 306, is, *see id. passim*,

1) a bonus for diversity
2) that allows exclusion of others.

Thus, a diversity bonus in university admissions to members of some groups, may exclude certain others (e.g., some white males). But this, of course, does not mean white males cannot be good students; similarly, even though the gay-marriage ban excludes gays from marriage, it does not at all mean that same-sex couples can't be good parents. (Just as polygamists may not be bad parents.)

Also, no "sex stereotyping" is going on here: in fact, if a child has "nontraditional-occupation" male and female parents, e.g., a homemaker father and a Marine Corps sniper mother, that may help break down gender stereotypes.

Without citing from the copious literature showing the benefits of having a mother and father: more diversity exists, *per se*, when a child can learn from a female parent and a male parent. And diversity counts. With two fathers, which one can breast-feed the child? And with two mothers, a child may have no close male role model. "[T]he two sexes

are not fungible; a community made up exclusively of one is different from a community composed of both[.]" *Ballard v. United States*, 329 U.S. 187, 193 (1946) (Douglas, J.).

### C. Taking Sodomy Seriously: or, Not Being Willfully Blind to the Effects of Homosexual Sex

To paraphrase the late Ronald Dworkin (RIP), taking sodomy seriously is important for courts to do. Some misplaced Victorianism or inappropriate gentility, perhaps, has led States' attorneys to avoid discussing the sodomy-norming quality of mandatory legalized gay marriage. When society lauds a status and pays someone to perform certain behavior, it should not surprise anyone if more of that behavior occurs, including among impressionable children.

Legalizing gay marriage may benefit *those who are in the marriage*, true. However, that does not account for the secondary effects of the marriage, somewhat as various commercial sexual or sexually-related entertainment options are regulable for their secondary effects. People who consume sexually-explicit entertainment may be allowed to do so under the First Amendment, but not in a neighborhood zoned for other purposes, like churches or children's schools. Similarly, even if (hypothetically) there were no reason for the State to regulate gay marriage if it occurred in a vacuum, the sodomy-norming and other secondary effects of gay marriage may give compelling state interest in regulating gay marriage.

Amicus is not just imagining sodomy-norming from gay parenting; Boucai, *supra* at 14, says:

"[What if the] impressionable psychosexual development of children is a basis for widening, not limiting, the range of 'lifestyle choices' to which they are exposed[?]", with a citation "urging advocates to affirm that nonheterosexual parents 'create an environment in which it is safer for children to openly express their own sexual orientations'". *Id.* at 484 & n.456. I.e., Boucai posits nonheterosexual parenting as *better than* heterosexual parenting, *see id.*, because a larger amount of children's homosexual behavior (which would tend to include sodomy at some point) will occur, *see id.* If Boucai admits it, who is anyone else to deny it?

Admittedly, gays may feel uncomfortable about not being allowed marriage. But so might polygamists. And sometimes, it is better that some gays feel uncomfortable than that society be endangered; *see, e.g.*, HealthDay News, *FDA Advisors Not Sold on Lifting Ban on Gay Men Giving Blood*, MSN, Dec. 3, 2014,[9]

> Members of a U.S. Food and Drug Administration advisory panel asked the agency on Tuesday to think carefully before repealing a 31-year ban on blood donations from gay and bisexual men.
>
> . . . .
>
> [A]n HHS advisory panel has recommended that a 12-month deferral period replace the ban. That would

[9] http://www.msn.com/en-us/health/medical/fda-advisors-not-sold-on-lifting-ban-on-gay-men-giving-blood/ar-BBgizDf.

> mean men who have had sex with another man in the previous year could not give blood.
>
> However, the panel convened Tuesday was not convinced by the HHS recommendation, according to the *AP*.
>
> "If I look at the science I would be very wary of a one-year deferral," said Dr. Susan Leitman. "It sounds to me like we're talking about policy and civil rights rather than our primary duty, which is transfusion safety."

*Id.* As Dr. Leitman said, *see id.*, putative "civil rights" may run into ugly realities, and "the science", *id.*, such as mass death from AIDS. Maybe more important than unlimited "gay rights", there is a more important liberty, the right not to die. And this is science, not "Bible-thumping animus and superstition".

AIDS is not the sole issue relevant re same-sex marriage, but if a Court does not consider disease and injury issues re sodomy-norming and gay marriage, that Court may be "aiding" many Americans to have an early and undeserved death.

### D. A Sexual-Orientation-Discrimination Claim Is Not Viable

Sutton believes sexual-orientation claims are a "rational basis" issue, *see DeBoer* at *61. But what if that were not always true? E.g., upholding gay-marriage bans would not estop this Court from finding that gays suffer illegal discrimination, maybe subject to heightened scrutiny, in employment or

other fields unrelated to marriage. For example, since a gay person can presumably flip a hamburger as well as a heterosexual can, it might be considered irrational for a restaurateur to fire the burger-flipper for being gay—but even if there were some "rational basis", maybe intermediate scrutiny could be applied instead. But gay marriage is distinguishable from business-related laws or private decisions.

After all, gay athletes Michael Sam and Jason Collins of the NFL and NBA might be superb at their sports, but that does not mean they can breast-feed children, or serve as female role models to little girls.

The Court could someday, if desired, adopt heightened scrutiny re homosexuality *vis-à-vis* employment or other issues besides marriage. (Amicus is not recommending the Court adopt higher scrutiny, only saying that rational-basis scrutiny re gay marriage does not rule out higher scrutiny elsewhere.) This kind of bifurcated scrutiny has been done before, *see, e.g.*, *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982) (applying strict scrutiny to alienage, but a lower level of scrutiny re political classifications).

*See also, e.g.*, Dan Chmielewski, *Ronald Reagan on Gay Rights*, Liberal OC, June 9, 2008,[10] on the Briggs Initiative, a 1978 California ballot measure banning gay teachers from public schools,

> Reagan met with initiative opponents[,] and, ultimately, at the risk of offending his anti-gay supporters in

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[10] http://www.theliberaloc.com/2008/06/09/ronald-reagan-on-gay-rights/.

> the coming presidential election, wrote in his newspaper column: "I don't approve of teaching a so-called gay life style in our schools, but there is already adequate legal machinery to deal with such problems if and when they arise."

*Id.* (citation omitted) Like Reagan, *see id.*, we can meaningfully distinguish between employment/business issues and family/lifestyle issues.

### E. A Sex-Discrimination Claim Is Not Viable

Also, Sutton does not really address sex-discrimination claims: which may be appropriate, since they are invalid. —If Amicus said there are public facilities that utterly exclude women: this would sound horrible, except when Amicus explains that the "facilities" are men's bathrooms. Context is key here, as with gay marriage.

*Inter alia*, how does it constitute gender discrimination for gay-marriage bans to *prohibit* a sex-segregated environment, i.e., monogender parentage, for children? To claim otherwise turns the idea of "sex discrimination" on its head. One is tempted to say that instead, any unhappy *children* of a same-sex couple might have a sex-discrimination or sex-segregation claim. *See, e.g.*, *Brown v. Bd. of Educ.* (347 U.S. 483 (1954)) (condemning segregated learning environments for children).

One way that *DeBoer* could be a useful case to consider, even though the State of Michigan did not use the following rationale, is the evidence that Michiganders disfavor gender discrimination at the same time they oppose gay marriage.

I.e., within two years, and thus with substantially the same electorate, Michiganders voted for and passed Proposal 06-2, in 2006 (preventing race, gender, or other controversial preferences in public education—e.g., affirmative action—, employment, or contracting) and also voted for and passed Proposal 04-2, in 2004 (banning same-sex marriage). Michiganders apparently believed that a gender preference in an area where it might plausibly make no difference (should one's gender really be a plus in getting a contract?) was discriminatory and illegal. So, it is hard to say that they were trying to promote sex discrimination by voting for Proposal 04-2, since they shortly banned it in Proposal 06-2.

Perhaps the People, with their common sense that is often far wiser than the ideas of some academics or activists, realized that in a marriage setting, gender-diversity is not discriminatory: it may even be mandatory for helping children have the optimal upbringing.

### F. Even Some Who Support Gay Marriage Oppose Mandatory Gay Marriage

Courts have not paid enough attention to those who endorse gay marriage, but acknowledge the damage from forcing it on the People. Jimmy Carter, *supra* at 1, falls into that category, as does law professor James G. Dwyer, *Same-Sex Cynicism and the Self-Defeating Pursuit of Social Acceptance through Litigation*,[11]

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[11] 68 SMU L. Rev. 1 (forthcoming 2015) (pre-edit draft, subject to revision), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2505754.

> As a member of the American political community, I strongly support extending legal marriage to same-sex couples. . . . I have contributed to The Gay and Lesbian Victory Fund.
>
> As a legal scholar, however, I recognize the distinction between something being the right thing to do and its being a matter of constitutional right, and I recognize that at this point in time the case for the latter with respect to same-sex marriage is too implausible to endorse.

*Id.* at 1. The argument that "Only animus motivates opponents of nationwide mandatory gay marriage", dies pretty quickly when we notice gay-marriage-endorsers like Carter and Dwyer, who do not endorse *mandatory* gay marriage.

### G. The Various Considerations Above, Reinforce One Another

Does, for example, the "channeling of bisexuals" argument have anything to do with the "gender-diversity per *Grutter*" argument? Yes, because there is not a fixed number of "gay marrieds" and "straight marrieds". Bisexuals and other "flexible" types receive motivation from laws like Michigan's, motivation to enter traditional marriages, increasing the number of children with a mother and a father. Without official endorsement of same-sex marriages, fewer are likely to occur, and resources that might have been spent on children (e.g., from artificial insemination) in those marriages, can be spent on

children in diverse-sex marriages, or other worthy causes. (Just as polygamists, or their children, may receive fewer state benefits than others.) The People can make their own "cost-benefit judgment" about what kinds of marriage to support. And further percolation on the intertwined issues *supra*, will likely benefit the judgment of the Court.

## VI. HOW LONG SHOULD THE COURT WAIT UNTIL GRANTING CERTIORARI?

Despite the need for more percolation, though, Amicus does not want the Court to wait forever. Some partisans might be hoping for years to elapse so that maybe an ultraconservative President can appoint several ultraconservative Justices to the Court and determine the opinion in any gay-marriage case. However, waiting for a few more Circuits to weigh in should take less than a year, so that the Court could issue an opinion by June 2016, well before the next general election.

The Fifth, Eleventh, First, and Eighth Circuits may all have issued same-sex-marriage opinions long before June 2016, opinions likely of great use to this Court. And there is poetic justice in waiting to see what the Eighth Circuit has to say, since its long-held opinion, *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), opposes mandatory gay marriage, *see id.* Will the Eighth Circuit change its mind or not?

After all, in *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), the dissent criticized the Court majority for not taking more time and effort before making a huge decision: "One would expect this Court to

demand more than fly-by-night briefing and argument before deciding a difficult constitutional question of first impression." *Id.* at 2655. In the huge matter of forcing gay marriage on the entire Nation, even on unwilling local supermajorities, the Court should take ample time to decide, lest it produce a *Bowers v. Hardwick* (478 U.S. 186 (1986)) of sorts, an indefensible decision which is later overruled.

And the tradition of releasing blockbuster decisions at the end of June need not always be followed, either. It is more important to decide the case rightly, and possibly release the opinion in the middle of a Term, than to rush the process and choose a case now just to be able to churn the opinion out by late June 2015, as if the Court were some jurisprudential fast-food restaurant. The *NFIB v. Sebelius* decision may have been unduly rushed, and the Court should not risk such a problem again.

* * *

In this holiday season, it seems some would put the label of "Scrooge" on anybody who opposes legalized nationwide gay marriage. However, one must be careful with the label of "Scrooge". What if some who support mandatory gay marriage, themselves show possible "animus" or "bigotry" towards more traditional forms of marriage? "See, e.g., Boies and Olson[,] lumping 'plural marriage' together with incest and 'unions of people and animals' and characterizing it as an 'absurd concept')[, and] implying that practiced polygamy is so rife with abuse it is categorically different from same-sex relationships[.]" Dwyer, *supra* at 22, at 67 n.208 (citations omitted).

But the Ghost of Cases Past, such as *Ballard*, *Schuette*, and *Lawrence*, warns us: that it can be Scrooge-y to pretend gender is meaningless, e.g., that it is good to deprive a child of a mother or father; that the People's vote is meaningful; and that a negative liberty does not imply a positive one. And we all should all fear the Ghost of Cases Yet to Come, if this Court produces some elitist, Jacobin, hyper-centralizing yoke on regional voters' legitimate marriage decisions, i.e., a tyrannical forced-gay-marriage opinion which eventually gets overruled like *Bowers*. On that note, Amicus wishes well to all for the holidays—especially to the People, whose common sense often exceeds that of courts.

## CONCLUSION

Amicus respectfully asks the Court to consider granting certiorari, in this case or another same-sex-marriage case or cases, in the future, when sufficient percolation has occurred; and humbly thanks the Court for its time and consideration.

December 18, 2014 Respectfully submitted,

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